United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 27, 2006

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Hertz Transporting, Inc.
Case 32-CA-22506-1

530-6001-5000
530-6050-0180
530-6083-0150-5000
530-8045-6201-5000
601-3725
725-6733-1000

This case was submitted for advice as to whether the Employer violated the Act when it unilaterally reduced the number of jobs at one of its facilities, arguably in violation of a grievance settlement agreement with the Union. We conclude that the case is most appropriately analyzed as a Section 8(d) contract violation case, and that the charge should be dismissed, absent withdrawal, because the Employer had a sound arguable basis for believing that its actions were privileged by the parties' collective-bargaining agreement.

We recognize that this could be viewed as a unilateral change case. Under this analysis, the allegation would be that the Employer was required to bargain with the Union before it changed the staffing at its airport facility, and that its claim of contractual privilege is unavailing because the Union did not "clearly and unmistakably" waive such bargaining.[1]

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[1] See generally Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (waiver of a union's statutory right to bargain over changes in terms and conditions of employment "will not be lightly inferred" and must be "clear and unmistakable"). We note, however, that the General Counsel has urged the Board to modify its "clear and unmistakable" waiver standard in unilateral change cases in favor of a different approach that entails interpreting the parties' contract and more fully considering the bargaining history and other factors that shed light on the specific change in issue. See Stanford Hospital & Clinics and Lucile Packard Children's Hospital, Case 32-CA-21170, Advice Memorandum dated October 14, 2005.

The Union, however, has not claimed that the Employer was obligated to bargain before reducing the number of jobs at the airport, but rather alleges that the Employer could not do so at all under a 2003 grievance settlement agreement which has not been modified by the parties' collective-bargaining agreement. Given this assertion, we conclude that the better approach to this case is to analyze it under Section 8(d). Thus, in cases where the dispute is over whether the employer unlawfully modified the parties' contract and there is no evidence of animus, bad faith, or an intent to undermine the union, an employer's good faith belief that its conduct is justified by a contractual agreement is a defense, and the Board will not seek to determine which of two plausible contract interpretations is correct.[2] For example, in NCR, the Board dismissed a union charge that an employer violated Section 8(a)(1) and (5) by transferring unit work and eliminating a job classification without bargaining with the union. The union argued that certain provisions in the parties' collective-bargaining agreement obligated the employer to obtain the union's consent before taking such action. However, the employer argued that the same provisions effectively waived the union's right to consent. Concluding that the employer's action was in "accordance with its reasonable interpretation of the parties'

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[2] See NCR, 271 NLRB 1212, 1213 (1984); Westinghouse Electric Co., 313 NLRB 452, 452 (1993), enfd. sub nom. mem. Salaried Employees Assn. of Baltimore Division, 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995); Crest Litho, Inc., 308 NLRB 108, 110 (1992); and, Vickers, Inc., 153 NLRB 561, 570 (1965). But see Carrier Corp., 319 NLRB 184, 196 (1995) (employer's interpretation of the contract found implausible). Further, the Board has made clear that its Section 8(d) contract modification analysis is appropriate even where the basis for a claim of contractual privilege is not contained in the four corners of the parties' agreement. See Bath Iron Works Corp., 345 NLRB No. 33, slip op. at 3-5 (2005) (Board applied NCR standard notwithstanding the General Counsel's contention that the enabling pension plan documents, which permitted termination or modification of the plan, were not themselves a part of the parties' collective-bargaining agreements; the General Counsel and the employer each had a sound arguable basis for their respective claims as to whether the agreements precluded the employer from merging the original pension plan into a different pension plan).

contract," the Board declined to endorse either parties' interpretation and dismissed the complaint.[3]

Here, the Union contends that the Employer has, since 2003, agreed to maintain at all times a minimum of 81 jobs at the airport and that this agreement has become a term of the parties' agreement that could not be changed without the Union's consent.[4] All of the Union's conduct has been consistent with this position. Thus, on January 25, 2006, when the Union contacted the Employer immediately upon receiving an advance copy of the location bid showing just 30 jobs at the airport, the Union claimed that the Employer was circumventing the contract and past practice and that, if the Employer went through with the 30-job location bid, the Union would file a grievance and the Employer would face labor unrest. The Union filed a grievance the next day claiming only a violation of the contract, which the Employer denied, and thereafter sought mediation pursuant to the contractual procedure.[5] Significantly, the Union

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[3] 271 NLRB at 1213, relying on Vickers, Inc., 153 NLRB at 570 (unilateral change in the status of certain job classifications from salaried employees to hourly paid employees lawful where the dispute concerning such action was "only a question of contract interpretation" and the employer's interpretation was reasonable "regardless of whether it was correct"). See also Crest Litho, 308 NLRB at 110-111 (layoff of unit employees lawful where dispute over whether the employer gave contractually required layoff notice was "essentially a contractual one" and the employer had a "sound arguable basis" for contending its action comported with the contract).

[4] In support of this claim, the Union relies upon the settlement of a 2003 grievance that arose when the Employer posted a scheduled job bid without any full-time jobs. According to the Union, the Employer settled this grievance by agreeing to post no fewer than 81 full-time jobs in the future. The only evidence of the agreement is a letter from the Union to the Employer, dated July 22, 2003, purporting to confirm the parties' agreement that in settlement of the grievance "the company will post and conduct a new shift bid with not less than eighty one (81) full time forty (40) hour shifts." The Union's letter is silent as to the future application of the agreement.

[5] The fact that the contractual procedure does not call for binding mediation or arbitration does not preclude

concedes that it did not demand bargaining, explaining that it did not do so because, in its view, the matter had just been fully bargained and was a matter for a grievance, not bargaining.[6]

The Employer denies knowledge of the 2003 81-job grievance settlement, and has asserted that it was contractually privileged to reduce the number of full-time airport jobs when it implemented the newly negotiated location bid. Thus, the Employer claims that the parties' collective-bargaining agreement not only does not require maintenance of any specific number of jobs, but gives it the exclusive right to determine staffing levels. In this regard, the Employer relies upon the agreement's management rights clause (Article XII), which grants the Employer sole responsibility for hiring, assigning and transferring employees, and determining schedules and job assignments, as well as the contractual provision on selection of trips (Article III, Sec. 1), which permits the Employer to determine shifts, schedules, and "the number, if any, employees needed." In our view, the Employer's interpretation that these contractual provisions privileged it to post only 30 jobs in the January location bid is at least reasonable and there is no evidence other than the Union's 2003 letter to suggest they have any other meaning.[7]

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analyzing this case as a Section 8(d) violation. While the Union could not seek enforcement of the mediator's recommendation that the Employer post 81 full-time jobs at the airport as provided in the 2003 grievance settlement, the Union could have filed suit under Section 301. See, e.g., Groves v. Ring Screw Works, 498 U.S. 168, 169, 175-176 (1990) (collective-bargaining agreement that included only a voluntary grievance procedure, reserved the parties' rights to resort to economic weapons if the procedures failed to resolve a dispute, and was silent as to judicial remedies, did not divest the courts of jurisdiction under § 301 of the Act).

[6] [*FOIA Exemptions 2 and 5*

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[7] That the Union asserts a different interpretation of the trip selection provision does not affect this conclusion. Thus, the Union's claim, that the trip selection provision

Given the 2003 letter's silence as to any future application, we cannot say that it is sufficient to foreclose the Employer's position. Therefore, we conclude that the Employer's position has a sound arguable basis, and that it did not violate its obligations under Section 8(d) and 8(a)5) by unilaterally reducing the number of jobs at its airport facility.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

B.J.K.

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is limited to the Employer's right to determine how many employees are to be dispatched at any one time in the driver transport van and does not mean the right to determine the number of employees over all, is unsupported by any bargaining history or other evidence. Furthermore, the fact that the Union may have a different, also reasonable interpretation of the trip selection provision does not establish that the Employer's interpretation is unreasonable.